

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK J. CARR and DEPARTMENT OF THE ARMY,
ARMY NATIONAL GUARD, Philadelphia, PA

*Docket No. 99-2587; Submitted on the Record;
Issued December 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he has continuing disability after September 20, 1994 causally related to his accepted employment injuries.

On September 15, 1993 appellant, then a 48-year-old heavy, mobile equipment repairman, filed a traumatic injury claim alleging that he sustained multiple injuries when he tripped and fell while running to escape a falling wall. The Office of Workers' Compensation Programs accepted appellant's claim for cervical, dorsal and lumbar strains and a scalp contusion. Appellant stopped work on the date of the accident and returned to light duty on December 6, 1993.

By decision dated September 21, 1994, after affording appellant proper notice, the Office terminated appellant's entitlement to compensation and medical benefits effective September 20, 1994, on the grounds that he had no residual condition or disability causally related to his accepted employment injuries.

Appellant, through counsel, requested a hearing before an Office hearing representative, which was held on March 22, 1995. In a decision dated August 11, 1995, the hearing representative affirmed the Office's September 20, 1994, termination of benefits, but found that medical evidence submitted subsequent to the Office's decision was sufficient to create a conflict in medical opinion on the issue of continuing injury-related disability.¹ The hearing representative found that a conflict existed between Dr. Harvey S. Kleinberg, an osteopath and treating physician, who opined in an October 10, 1998 report that appellant continued to suffer from residuals of his employment-related injuries and Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon and Office referral physician, who opined in a July 18, 1994 report that appellant's injury-related conditions had fully resolved and that, as far as his injury-related

¹ This decision clarified and modified a decision of the hearing representative issued July 31, 1995.

conditions were concerned, appellant could return to full duty. Accordingly, the hearing representative remanded the case to the Office for referral to an independent medical examiner.

On remand, on June 4, 1998 the Office referred appellant to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion.² In a decision dated March 22, 1999, the Office found that the weight of the medical evidence, represented by the opinion of Dr. Okin, established that appellant had no continuing injury-related disability or residuals after September 20, 1994. By letter dated April 7, 1999, appellant, through counsel, requested a review of the written record. In a decision dated July 24, 1999, an Office hearing representative affirmed the March 22, 1999 decision.

The Board has duly reviewed the case record on appeal and finds that this case is not in posture for a decision on the issue of whether appellant has continuing disability after September 20, 1994, causally related to his accepted employment injuries. Further medical development is required.

Under the Federal Employees' Compensation Act,³ once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.⁵ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁶ In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁷

On remand the Office referred appellant to Dr. Okin, in order to resolve the issue of whether appellant has any injury related disability or residuals after September 20, 1994. In his report dated July 1, 1998, he reported the results of his physical examination and reviewed the prior medical evidence and test results of record, including the results of a magnetic resonance imaging (MRI) performed in December 1993. Dr. Okin listed his impression as: (1) disc

² In the interim, on October 6, 1995 appellant, through counsel, appealed the Office's August 11, 1995 decision affirming the termination of benefits effective September 20, 1994, to the Board. By order issued December 24, 1997, however, the Board dismissed the appeal on the grounds that, as the hearing representative had remanded the case for further development, the case was not ripe for appeal.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁵ *Id.*

⁶ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

⁷ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

degenerative disease of the cervical spine; (2) disc degenerative disease of the lumbosacral; and (3) resolved cervical and lumbosacral spine sprain. Dr. Okin further stated:

“Based on my clinical examination and the review of the patient’s records, review of his MRIs and lumbosacral spine and cervical spine films it is my opinion he has recovered from his cervical spine and lumbosacral spine sprain but is left with significant disability as a result of his disc degenerative disease of the cervical and lumbosacral spine with central spinal canal stenosis at the L5-S1 level. He has not returned to his preinjury level but I think this is based more on degenerative changes of his back and neck as opposed to the injury that he incurred.

“Appellant is not disabled from any employment but is disabled from any type of occupation, which would require frequent bending, stooping, lifting. He is disabled because of his knee. It is difficult to determine the exact nature of his ability to get around because of the knee problem when I saw him today.”

While Dr. Okin clearly stated that all of appellant’s injury-related conditions had resolved, his statement that appellant has not returned to his preinjury level but that this “is based more on degenerative changes of his back and neck as opposed to the injury that he incurred” suggests that appellant’s disability may, in part, be due to his accepted employment injury. Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.⁸ As Dr. Okin’s opinion is somewhat ambiguous, the Office should obtain clarification from the physician. Accordingly, the Board finds that the case must be remanded to the Office for further medical development.

⁸ *Margaret M. Gilmore*, 47 ECAB 718 (1996). The Board further notes that, if Dr. Okin’s statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if his report is vague, speculative or lacks rationale, the Office must refer appellant to another impartial medical specialist for a rationalized medical opinion. *Id.*

The decisions of the Office of Workers' Compensation Programs dated July 24 and March 22, 1999 are hereby set aside and the case is remanded to the Office for further development in accordance with this decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, DC
December 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member